

understandably anxious to receive these materials at the earliest possible opportunity. In particular, given the nature of the charges, counsel was anxious to obtain and review transcripts of the defendant's grand jury testimony and memoranda prepared by special agents of the FBI related to their interviews of the defendant.

Due to the nature of the investigation, and to the high-level government positions held or formerly held by the defendant and many potential witnesses, much of the evidence obtained by the grand jury contains sensitive or classified material. The government currently is in the process of conducting a review of documents obtained during the course of the investigation and having these documents, together with grand jury transcripts, reviewed by the appropriate agencies for the purpose of identifying classified information and of assessing whether relevant documents may be declassified. As reported to the Court on November 3, 2005, this review is expected to take significant time. In an effort to expedite the delivery of discovery materials to the defendant and his counsel while maintaining the confidentiality of the materials and the integrity of the ongoing investigation during the review process, the government assisted defense counsel in obtaining clearance to review classified documents, and proposed to the Court a general protective order covering unclassified information and documents, and a protective order covering documents specifically identified as classified. The language of both orders was agreed to by counsel for the defendant.

Intervenors Dow, Jones & Company, Inc. ("Dow Jones") and The Associated Press

have objected to the entry of the general Protective Order proposed by the government on November 10, 2005, which they argue is overbroad. Neither intervener disputes the fact that there may be legitimate grounds for protecting from public disclosure certain documents produced to the defendant in discovery, or the fact that the Court has the authority pursuant to Fed. R. Crim. P. 16 to enter a protective order to effect such protections. Instead, they argue that the Special Counsel should be required to apply for a more narrowly tailored order, and to state his reasons for seeking such an order. The defendant has responded to the objections of the interveners by urging that the court “take no action that might impair Mr. Libby’s ability to obtain expeditions and complete discovery of materials in the possession of the government. In light of the objections raised by interveners Dow Jones and the Associated Press, the government has proposed a revised Protective Order that covers only non-classified documents produced in discovery that fall into one or more categories: (a) grand jury transcripts; and (b) documents containing private, personal information of individuals, such as home telephone numbers, residence, or email addresses. As demonstrated below and in the attached affidavit of Special Counsel, there is good cause to protect such documents from public disclosure during the discovery process. The restrictions on public disclosure sought by the government herein are limited to the discovery process. Should the protected documents be filed with the Court or offered in evidence at trial, they will then be available to both the press and the public.

ARGUMENT

“Rule 16(d)(1) authorizes the court to permit discovery but to issue ‘enforceable orders against unwarranted disclosure’ of the information.” *Morgan v. D.O.J.*, 923 F.2d 195 (D.C. Cir. 1991)(quoting *Alderman v. United States*, 394 U.S. 165, 185 (1969)(discussing authority of court to prohibit unwarranted disclosure of national security information). In this case, materials to be provided to the defendant in discovery include documents that are appropriately restricted.

Transcripts of Grand Jury Testimony

This Court has recognized that there is no First Amendment right to access to grand jury proceedings. *E.g., In re Motions of Dow Jones & Co.*, 142 F.3d 496, 499 (D.C. Cir. 1998). To the contrary, it is well settled that in the grand jury context “privacy and secrecy are the norm.” *In re Sealed Case*, 199 F.3d 2000 (D.C. Cir. 2000). *See also Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, at 218 n. 9 (1979). Indeed, the Supreme Court consistently has recognized that “the proper functioning of our grand jury system *depends* upon the secrecy of the grand jury proceedings.” *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958)(emphasis added). For this reason, “[u]nlike typical judicial proceedings, grand jury proceedings and related matters operate under a strong presumption of secrecy.” *See In re Sealed Case*, 151 F.3d 1085, 1069-71 (D.C. Cir. 1998).

The need to preserve the confidentiality of grand jury proceedings is of course most acute where, as here, the grand jury’s investigation is ongoing. *See, e.g., Butterworth v.*

Smith, 494 U.S. 624, 632 (1990)(noting that some interests served by grand jury are less significant after grand jury has been discharged). Protecting grand jury transcripts from being disseminated beyond that which is necessary for the defendant to prepare his defense serves the interests that underlie Fed. R. Crim. P. 6(e), including, the need to encourage voluntary participation, and full and frank testimony, of witnesses, to protect witnesses from retribution and inducements, and to assure that “persons who are accused but exonerated by the grand jury will not be held up to public ridicule.” *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070 (D.C. Cir. 1998)(quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979)). These concerns fully justify a protective order restricting the disclosure and use of grand jury transcripts provided to the defendant in discovery in this case.

Records of Government Officials Implicating Personal Privacy Concerns

Some of the records to be produced in discovery implicate legitimate personal privacy concerns of witnesses and others. For example, daily calendars, emails, and telephone call logs, and telephone records include records of communications with family members, doctors and personal contacts, as well as personal telephone numbers and residence and home email addresses. In particular, records of this type were obtained from a number of individuals in the Office of the Vice President, including the defendant. The records (particularly email, calendars and phone logs) were obtained in bulk with investigators reviewing the documents to separate the relevant from the irrelevant. The most efficient and expeditious manner of

producing these documents is to do so in groups. In the government's view, it is appropriate to allow disclosure of such information to the defendant and his counsel with the restriction that such information only be used in preparing the defense; however, personal, private information should be protected from public dissemination.

The protection of the personal privacy rights of witnesses is a legitimate basis upon which to restrict disclosure and use of discovery materials. *See, e.g., In Re Sealed Case (Medical Records)*, 381 F.3d 1205, 1217 (D.C. Cir. 2004)(addressing a protective order in a civil case under the rule of civil procedure analogous to Rule 16(d)(1), Fed. R. Civ. P. 26(c). In that case, the court noted that, “[a]lthough [Rule 26(c)] contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the rule. *In Re Sealed Case (Medical Records)* 381 F.3d at 127 (citing *Seattle Times Co. V. Rhinehart*, 467 U.S. 20, 35 n. 21 (1984) and *Pearson v. Miller*, 211 F.3d 57, 72 (3d Cir. 2000)(holding that “[l]egitimate interests in privacy are among the proper subjects of Rule 26(c)’s protection”).

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that this Court enter the modified Protective Order and deny the applications of Dow, Jones & Co. and The Associated Press as moot.

Respectfully submitted,

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